Supreme Court, U.S.
FILED

No. 93-1779 MAY 6 1994

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In the Supreme Court of the United States

October Term, 1994

William A. Calvo, III,
Petitioner

- against -

The Florida Bar
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126

Dated: May 8, 1994

QUESTIONS PRESENTED

1. **DUE PROCESS:**

A. Was former Disciplinary Rule 1-102(A)(6) on which the Florida Supreme Court based its decision unconstitutionally vague?

B. Did the proceeding below violate the Petitioner's[1] rights to due process under the 14th, 5th, 6th and 8th Amendments to the United States Constitution, *to wit*, the rights to:

(1) Assistance of legal counsel?

(2) Timely notice?

(3) A timely hearing?

(4) Meaningful discovery?

(5) Mandatory judicial notice?

(6) Presentation of relevant evidence?

(7) Exclusion of incompetent evidence?[2]

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1. Hereafter referred to as "Mr. Calvo."

2. *E.g.*, testimony of experts as to statutes or rules, in lieu of introduction of the statute or rule; introduction of final judgments in cases involving lower standards of proof; introduction of third hand hearsay testimony, despite access to original declarant, *etc.*

2. **EQUAL PROTECTION**: Did the proceeding below deprive Mr. Calvo of his rights under the equal protection clause of the 14th Amendment by denying him:

A. The rights guaranteed to defendants by the Constitution of the State of Florida?

B. The right to a decision based on the legal factors previously established by the Florida Supreme Court in conjunction with attorney disciplinary proceedings?[3]

C. The right to non-arbitrary imposition of discipline?

D. The right not to be subjected to cruel or unusual punishment?

E. The right not to be singled out based on his national origin or other minority status?

3. **EX POST FACTO LEGISLATION**: Did the Florida Supreme Court's re-interpretation of the obligations of Florida attorneys when acting as underwriter's counsel

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3. *E.g.*, the right to enforcement of the standards for invocation of the doctrines of timely proceedings, latches, waiver, estoppel, method for allocating costs, evidentiary standards, repealed rules regulating conduct, requirement for proof that attorney-client relationship exists, *etc.*

constitute a Constitutionally prohibited *ex post facto* law?

4. **FEDERAL QUESTIONS:**

A. Did the Florida Supreme Court improperly interpret the following federal questions:

1. The role of underwriter's counsel under Securities and Exchange Commission[4] Rule 436?

2. The requirement of counsel to participate in sales activities under federal securities laws?

B. The effect of the Court's interpretation of Section 10(b) of the Securities Exchange Act of 1934, as amended, in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), on Securities and Exchange Commission injunction and Rule 2e actions based on aider or abettor theories.

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4. The United States Securities and Exchange Commission is hereinafter referred to as the "Commission."

LIST OF PARTIES

The Parties to the proceeding below are:

William A. Calvo, III

Petitioner

11355 Southeast 54the Court; Belleview, Florida 34420

Telephone Number (904) 245-4126

THE FLORIDA BAR

650 Apalachee Parkway

Tallahassee, Florida 32399-2300

TABLE OF CONTENTS

Item		Pages
Questions Presented		P-1
List of Parties		P-4
Table of Contents		P-5
Table of Authorities		P-6
I	Opinion Below	1
II	Jurisdiction	2
III	Constitutional, Statutory & Regulatory Provisions Involved	2
IV	Statement of the Case	3
V	Reasons for Granting the Writ	25
VI	Argument	29
VII	Conclusion	63
Appendix		In Separate Volumes[5]

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5. Footnotes to the cases contained in the Appendix are numbered sequentially throughout each Appendix Volume, rather than as numbered in the decisions, due to the requirements of the word-processing program utilized to prepare them.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

United States

Article One, Section Nine, [3], pages 13, 26, 31, 58, 60 and 62.

Fifth Amendment, pages 2, 26, 31, 42 and 53.

Sixth Amendment, pages 2, 26 and 31.

Eighth Amendment, pages 2, 26 and 53.

Fourteenth Amendment, pages 2, 26, 31, 42, 50 and 53.

Florida

Article One, Section Two, pages 2, 26, 33, 42 and 47.

Article One, Section Nine, pages 2, 26, 33 and 42.

Article One, Section Sixteen, pages 2, 26, 33 and 42.

Article One, Section Seventeen, pages 2, 26 and 53.

RULES AND STATUTES

Securities and Exchange Commission

Rule 436 of Regulation C, promulgated by the Commission under authority of Section 6 of the Securities Act of 1933, as amended, 17 C.F.R. 230.436, pages 3,

19, 21, 35, 59[6] and 62.

Florida Bar

Former Florida Code of Professional Responsibility

Rule 1-102(A)(1), pages 3 and 13.

Rule 1-102(A)(6), pages 3, 13, 22, 27, 29, 30, 31, 32, 53 and 58.

Rules Regulating the Florida Bar

Rule 3-7.4(k), pages 3, 13, 39 and .41

Rule 4-1.2, page 3.

Rule 4-3.7, pages 3, 16 and 34.

Florida Evidence Code

90.616(c), pages 2, 16 and 34.

90.203, pages 2, 15, 43 and 48.

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6. A reference is also made on page 59 to Securities and Exchange Commission Rule 478 of Regulation C, promulgated by the Commission under authority of Section 6 of the Securities Act of 1933, as amended, 17 C.F.R. 230.478.

CASES

Florida

D'Alemberte v Anderson, 349 So.2d 164 (Fla. 1977), page 31.

Cash v Culver, 120 So.2d 590 (Fla. 1960), page 33.

Delk v Department of Professional Regulation, 595 So.2d 966 (Fla. 6th DCA 1992), page 31.

Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960), page 34.

Flord v State, 129 So. 861 (Fla. 1930), page 31.

The Florida Bar v Adler, 589 So.2d 899 (Fla. 1991), page 56.

The Florida Bar v Agar, 394 So.2d 405 (Fla. 1981), page 34.

The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992), page 56.

Florida Bar v William A. Calvo, III, Case Number 78,395, 630 So.2d. 548 (Fla. 1993), pages 1, 11, 24, 31, 38, 44, 45, 50, 51, 55 and 57.

The Florida Bar v Diamond, 548 So.2d 1107 (Fla. 1989), page 56.

The Florida Bar v Levine, 571 So.2d 420 (Fla. 1990), page 56.

Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978), pages 40, 41, 44, 45, 50, 51, 52 and 56.

The Florida Bar v Moxley, 462 So.2d 814 (Fla. 1985), page 56.

The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992), pages 53 and 54.

The Florida Bar v Onett, 504 So.2d 388 (Fla. 1987), pages 51, 52 and 57.

The Florida Bar v Price, 478 So.2d 812 (Fla. 1985), pages 45, 51, 52 and 57.

Florida Bar v Randolph, 238 So.2d 635 (Fla. 1970), pages 39, 40, 56

The Florida Bar v Simons, 581 So.2d 154 (Fla. 1991), page 56.

The Florida Bar v Stalnaker, 485 So.2d 815 (Fla. 1986), page 56.

The Florida Bar v Trinkle, 580 So.2d 157 (Fla. 1991), page 56.

The Florida Bar v Winderman, 614 So.2d 484 (Fla. 1993),

page 56.

Fort v Fort, 104 So.2d 69 (1st DCA, 1958), page 31.

Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964), page 31.

Lawton v State, 13 So.2d 211 (Fla. 1943), page 45.

Myles v State, 602 So.2d 1278 (Fla. 1992), page 38.

Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (Fla. 3rd DCA 1984), page 43.

State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959), page 31.

State ex rel. Sbordy v Rowlett, 190 So.2d 59 (Fla. 1935), page 47.

State v Wershow, 343 So.2d 605 (Fla. 1977), page 31.

Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (3rd DCA 1988), page 30.

Times Pub. Co. v Burke, 375 So.2d 297 (Fla. 1979), page 33.

Traylor v State, 596 So.2d 957 (Fla. 1992), page 38.

Weathers v Davis, 196 So. 487 (Fla. 1940), page 33.

Webb v Department of Professional Regulation, Board of Professional Engineers, 595 So.2d 1103 (Fla. 5th DCA 1992), page 31.

Yaffee v International Co., 80 So.2d 910 (Fla., 1955), page 31.

Commission Cases

In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), page 1, 10, 18, 25, 33, 44 and 45.

Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), page P-3, 10, 18, 20, 25, 29 and 63.

Commission v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988), page 1, 10, 18, 25, 44, 45

Calvo v Commission, ___U.S. ___, 110 S.Ct. 3228, 110 L.Ed. 2d 674 (1990), page 1.

Commission v Calvo, 891 F.2d. 457 (2nd Cir. 1989), pages 1, 25, 37, 44 and 45.

The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, Commission Administrative Cases Number 3-6953 and 3-6907, pages 2 and 25.

Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, ___ F.2d ____ (11th Cir. 1992), *rehearing denied*, pages 1, 15, 25, 43 and 48.

Pinter v Dahl, 108 S. Ct. 2063 (1988), page 63.

Due Process & Equal Protection Cases

Baggett v Bullitt, 377 U.S. 360 (1964), page 29.

Brown v Louisiana, 383 U.S. 131 (1966), page 29.

Collingsworth v Mayo, 173 F.2d 695 (5th Cir. 1949), page 33.

Cox v Louisiana, 379 U.S. 536 (1965), page 29.

Davis v United States 415 F.Supp 1086 (D. Kan. 1976), page 43.

Edwards v South Carolina, 372 U.S. 229 (1963), page 29.

Fuentes v Shevin, 407 U.S. 67, 303 U.S. 444, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972), pages 38 and 41.

Holman v Washington, 364 F.2d 618 (5th Cir. 1967), page 46.

Harrel v Tobriner, 279 F.Supp 22 (D. D.C. 1968), page 47.

Johnson v Brelje D.C. 482 F.Supp. 125 (D. N.E Ill. 1979), page 49.

Keyishian v Board of Regents, 385 U.S. 589 (1967), page 29.

Lovell v City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938), page 29.

Matthews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976), page 39.

Mooney v Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed 791, (1935), page 34.

NAACP v Button, 371 U.S. 415 (1963), page 30.

Talley v California, 362 U.S. 60 (1960), page 29.

Thornhill V Alabama, 310 U.S. 88 (1940), page 29

Tumey v State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), pages 44 and 46.

Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975), pages 49 and 50.

Truax v Corrigan, 257 U.S. 320, 42 S.Ct. 124, 66 L.Ed 254 (1921), page 52.

United States v Grande 620 F.2d 1026 (4th Cir. 1980), page 18.

Watkins v United States, 354 U.S. 178 (1957), page 29.

OTHER SOURCES

American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980), page 21.

Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977), page 21.

Florida Bar, *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys* (1987), pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36,

7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46; pages 21, 35, 60 and 61.

Hazen, THE LAW OF SECURITIES REGULATION; *West Publishing Co., 1985,* at pages 214 through 217, page 62.

Loss, Fundamentals of Securities Regulation; *Little, Brown and Company, 1983,* at pages 1034, 1035, 1234 through 1242, and 1256, page 62.

Matthew Bender, 1992, at pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119, page 62.

Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37* The Business Lawyer 915 (1982), page 21.

Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980), pages 21 and 22.

Sommner, *11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act*, page 62.

Sommner, *11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992,* at pages 4-343, 4-344, 4-231 through 4-234.11, page 62.

PETITIONER, William A. Calvo, III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court in the case of Florida Bar v William A. Calvo, III (the "Calvo Case"), Case Number 78,395, 630 So.2d. 548 (Fla. 1993), affirming the recommendation of the referee in the underlying Bar Disciplinary Proceeding. Mr. Calvo's motion for rehearing was denied (the "Rehearing Motion") on February 14, 1994.

I. OPINION BELOW

The opinion of the Florida Supreme Court in this matter and its denial of the Rehearing Motion are included in the separate Appendix transmitted herewith. The recommendation of the referee in the underlying Florida Bar proceeding is also included in the Appendix.[1]

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1. The facts underlying the decision in the case below have also been considered in three previous series of cases, Commission v Electronics Warehouse, *et. al.*, 689 F. Supp. 53 (D. Conn. 1988), *affirmed* 891 F.2d 457 (2nd Cir. 1989), *cert. denied* 110 S.Ct. 3228, 110 L.Ed. 2d 674 (1990), hereinafter referred to as the "Injunction Case;" In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), hereinafter referred to as the "2e Case (a copy is included in the Appendix);" and, Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, 563 F.2d 385 (11th Cir. 1992), *affirmed without opinion*, hereinafter referred to as the "Gallagher Appeal," an appeal of the Commission's

II. JURISDICTION

The opinion of the Florida Supreme Court was filed on December 16, 1993. The Rehearing Motion was denied, without comment, on February 10, 1994. The Jurisdiction of this Court is invoked pursuant to 102 Stat. 662, 28 U.S.C. Section 1257 (June 27, 1988).

III. CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS

CONSTITUTIONAL PROVISIONS: Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Article One, Sections Two, Nine, Sixteen and Seventeen of the Florida Constitution.

STATUTORY PROVISIONS: Sections 90.616(c) and 90.203 of the Florida Evidence Code.

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decision in the administrative action encaptioned The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, SEC File No. 3-6952, hereinafter referred to as the "Gallagher SEC Case." As a result of the Florida Supreme Court's decision, the United States Courts of Appeal for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Florida have initiated proceedings to consider Mr. Calvo's continued fitness for membership in their respective Bars. Copies of the motions to show cause and Petitioner's response thereto are included in the Appendix.

REGULATORY PROVISIONS: Rule 436 promulgated under authority of the Securities Act of 1933, as amended, (17 C.F.R. Section 230.436). Former Disciplinary Rules 1-102(1) and 1-102(a)(6) and current Rules 3-7.4(k), 4-1.2 and 4-3.7, subsections (1), (2) and (4) of the Rules Governing the Florida Bar.[2]

IV. STATEMENT OF THE CASE

During September of 1984, Mr. Calvo's law firm[3] prepared one draft of a post effective amendment to the registration statement for the Electronic Warehouse, Inc. ("Warehouse"), which was integrated into materials prepared by other persons and filed with the Commission by such other persons. Three subsequent amendments to the registration statement were prepared by persons other than the Calvo Firm. Only the last post effective amendment was declared effective.[4]

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2. The texts of the foregoing provisions are included in the Appendix. For purposes of economy, the "Rules Regulating the Florida Bar" will be hereinafter referred to as the "R.Reg.F.B."

3. Hereinafter, together with its successors in interest, referred to as the "Calvo Firm."

During September of 1984, the Calvo Firm also agreed to file the state securities registration applications (a function referred to as Blue Sky counsel) and the amended Warehouse registration statement with the National Association of Securities Dealers, Inc. (the "NASD"), on behalf of the underwriter.[5] Consequently, the Calvo Firm was described in the first post effective amendment as having served as counsel to the underwriter.[6] During October of 1984, Mr. Calvo was advised that the Calvo Firm would not be serving as Blue Sky or underwriter's counsel, having been replaced by a New York law firm, required in order to expedite NASD review of the post effective

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4. On November, 8, 1984. Those facts were admitted by Bremer, the Florida Bar's principal witness, in affidavits to the Commission used in the Injunction Case. No request for acceleration of the post effective amendment was filed by the Calvo Firm on behalf of the underwriter, any such request having been provided by the Beer Firm (as hereinafter defined).

5. The principal function as underwriter's counsel to have been undertaken by the Calvo Firm.

6. The scope of such representation was limited to the functions described because Warehouse and the underwriter desired to limit legal expenses and thus elected to rely on former underwriter's counsel for all other functions normally associated with underwriter's counsel's activities.

amendments.[7] After October 24, 1984, the Calvo Firm terminated all active Warehouse related activities. All Blue Sky work and NASD filings were prepared, filed and negotiated by the Beer Firm, and the request for acceleration of the last post effective amendment was provided, on behalf of the underwriter, by the the Beer Firm. Inexplicably, the Warehouse prospectus continued to list the Calvo Firm as counsel to the underwriter.[8]

The underwriter was a client of the Calvo Firm in other matters including the public offering of securities for Dennison, Inc.;[9] and, its principals were personal friends

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7. The law firm of Robert Beer and Stephen Wilkes (the "Beer Firm"). A retainer agreement was signed by the Beer Firm with Warehouse on or about October 24, 1984, and a letter referring thereto dated November 12, 1984, was included as an exhibit to Mr. Calvo's answer to the Florida Bar's complaint in the Florida Bar proceeding. Additional exhibits to such answer included excerpts from Bremer's diaries noting that the Beer Firm was responsible for the NASD and Blue Sky filings (exhibit B-2.10(g)(3) to Mr. Calvo's answer). Based on a review of Mr. Bremer's diary entries, it is clear that the Beer Firm had previously been selected to perform the tasks offered to the Calvo Firm, since the relationship with the Beer Firm was established during June of 1984.

8. As inexplicably, the records of the Commission continued to list the original law firm involved with the underwriter as underwriter's counsel, and all correspondence to underwriter's counsel was sent thereto, rather than to either the the Beer Firm or the Calvo Firm.

9. In which Barnett Bank also served as the escrow agent.

of Mr. Calvo and his wife. Consequently, on a limited number of occasions during the offering period, Mr. Calvo was contacted by the underwriter for help in developing an underwriting syndicate.[10] In response to such requests, Mr. Calvo provided the names and telephone numbers of three people to the Warehouse Principals[11] (David E. Jordan, Hermann Burckhardt and Francesca Daniels). In addition, the principal of the underwriter and Mr. Calvo discussed the possibility that the Calvo Firm would represent the underwriter at the Warehouse closing.[12]

On two occasions during the offering counsel to Warehouse contacted Mr. Calvo requesting advice.[13] Once

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10. Mr. Calvo neither asked for nor received any compensation for such assistance.

11. For purposes of this Petition, the phrase Warehouse principals will refer to Edward Bremer, Warehouse's president, and Gary Granai, Warehouse's attorney.

12. Such discussion first took place during January of 1985; however, no closing took place at that time and the Calvo Firm was not re-retained, although draft closing documents were provided to the Calvo Firm by legal counsel to Warehouse.

13. On neither occasion did Mr. Calvo request or receive compensation for sharing his legal observations. The testimony of former Commission staff member Jack Stein introduced by Mr. Calvo at the Florida Bar hearing made it clear that Mr. Calvo regularly provided informal, uncompensated assistance to colleagues, with reference to questions involving securities law.

during March of 1985 and the second on or about April 15, 1985. On the first occasion, counsel to Warehouse informed Mr. Calvo that the president of Warehouse had been indicted[14] and was advised by Mr. Calvo that such person should resign and a post effective amendment disclosing such fact filed.[15] On the second occasion, counsel to Warehouse asked about the legality of guaranteeing an investor a profit. After advising counsel to Warehouse that such guarantees were illegal and inappropriate, Mr. Calvo expressed surprise that the Warehouse offering was still pending in light of Bremer's indictment. At that time he was told that the indictment had been dropped.[16]

On April 19, 1985, without notice, the Warehouse Principals and the principal of the underwriter[17] appeared

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14. Although Warehouse's attorney assured Mr. Calvo that Bremer was innocent and the matter was minor and in the process of being worked out.

15. Mr. Calvo informed the principal of the underwriter of such conversation and conclusion. He also advised the underwriter that the indictment gave the underwriter a basis for withdrawing from the offering.

16. Until the testimony at the Florida Bar final hearing, Mr. Calvo did not recall whether he had been told that the indictment had been dropped or was in the process of being dropped; however, testimony by Joseph Caruncho, a former employee of Mr. Calvo called as a witness by the Florida Bar, clarified such point.

17. Collectively referred to in this Petition as the "Closing Party."

at Mr. Calvo's office and stated that they were closing on the Warehouse offering, that day. Because the Calvo Firm had been provided no time to prepare for a closing[18] it declined to be re-engaged as underwriter's counsel; however, as a favor to the underwriter, Mr. Calvo permitted the Closing Party to use a conference room and made a recently hired associate[19] available to assist in clerical matters.[20] Mr. Calvo also informally responded to questions by the underwriter based on facts provided by the Warehouse principals;[21] joined the Closing Party briefly during lunch; and, in response to a telephone request during the afternoon, spoke to an acquaintance of

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18. Mr. Calvo was preparing for a Florida Bar hearing on a minor matter scheduled for Monday, April 22, 1985, and was personally unable to provide closing related assistance in any meaningful fashion. Although he requested a continuance of such hearing, the Florida Bar refused to grant it.

19. He had passed the Florida Bar Exam but was awaiting admission that month.

20. Mr. Calvo neither asked for nor received any compensation for such assistance.

21. After making it clear that he could not, based on the time provided, either research the issues or verify the facts. Mr. Calvo suggested a trust closing pending verification of the alleged facts. Although the Closing Party agreed to such procedure, Bremer and Granai failed to abide by such agreement.

Bremer concerning repayment of a loan using offering proceeds[22] to which Bremer claimed entitlement.[23]

Rather than closing on Friday, April 19, 1985,[24] the Closing Party postponed the closing until Monday (April 22).[25] Mr. Calvo declined to provide any legal opinions or participate in the closing but at the request of the Closing Parties, he prepared and delivered disbursement instructions to the escrow agent, after the closing had started.[26]

The Warehouse closing was illegal for three reasons. First, the escrow agent miscalculated the escrow period by fifteen days; second, Bremer's indictment had not been dropped; and, third, the minimum offering amount was not met (Bremer borrowed funds to make it appear that the minimum had been met and repaid the loans from offering

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22. Bremer claimed to have advanced funds for expenses to have been paid from offering proceeds.

23. Mr. Calvo and his wife also ran into the Closing Party, and others, that evening at a Fort Lauderdale restaurant.

24. After having left Mr. Calvo's offices, purportedly to go the the offices of the escrow agent to close the offering.

25. The date of the hearing which the Florida Bar refused to postpone.

26. By that time, the instructions had been provided directly to the escrow agent by the Closing Party.

proceeds to which he was not entitled).[27]

During March of 1986, the Commission initiated the Injunction Action and included Mr. Calvo as an aider and abettor based on allegations that he had served as underwriter's counsel throughout the offering, was responsible for amending the registration statement to keep it current and had been reckless in not preventing the fraudulent closing. During June of 1987, an injunction was issued against Mr. Calvo based on a motion for summary judgment by the Commission[28] (a motion for reconsideration was denied during June of 1988). Based on the injunction the Commission initiated an action under its Rule 2e which resulted in a two year suspension of Mr. Calvo from practice before the Commission (the 2e action).[29] The suspension was completed during July of 1990.

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27. The Commission Judge in the 2e Case found that Bremer and Bremer's attorney had deceived Mr. Calvo on such points.

28. The Court is asked to note that its decision in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994), would have made that action untenable.

29. Like the Injunction action, the predicate for the 2e proceeding has been removed as a result of this Court's recent decision in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

Florida Bar proceedings were initiated in 1987;[30] however, Mr. Calvo was never advised of their initiation or of the identity of the complainant. During the summer of 1988, Mr. Calvo was notified that a complaint was being referred to Grievance Committee 17(c) for investigation and Mr. Calvo immediately turned over all his Warehouse files to the attorneys appointed to investigate the matter.[31] During June of 1989, the Grievance Committee held an evidentiary hearing; however, it refused to grant a continuance requested by Mr. Calvo's attorney as a result of which Mr. Calvo was un-represented by counsel.[32]

The Florida Bar presented its case and witnesses; however, the Grievance Committee did not permit Mr. Calvo to rebut due to the lateness of the hearing and instructed him to prepare a written submission which it would consider and thereafter reconvene to provide Mr.

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30. Florida Bar case number 87-21,392(17C).

31. Those files were eventually lost by the Florida Bar.

32. The Florida Bar took the position that Mr. Calvo did not have a right to attend the hearing, to legal counsel thereat, to cross examine witnesses or to testify; rather, the Florida Bar claimed that all of such activities, if permitted, would be at the sufferance of the Florida Bar.

Calvo an opportunity to respond to questions.[33] Mr. Calvo prepared and filed a submission but the Grievance Committee never reconvened to question him; rather, it appears that one or more of its members reached a decision during September of 1989, which was neither put in writing nor communicated to Mr. Calvo.

After completion of his 2e suspension in 1990, Mr. Calvo contacted the Florida Bar to ascertain his status. By written certification he was informed that he was in good standing whereupon he returned to Florida[34] and re-established his legal practice. He heard nothing from the Florida Bar until August of 1991, when he was served with the initial complaint.[35] The initial complaint had been hastily drafted and was never signed by the presiding officer of the Grievance Committee that purportedly authorized it

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33. In April of 1989, Mr. Calvo and his family moved to North Carolina, where they bought and operated a country inn until after conclusion of the two year Commission suspension.

34. Such move resulted in the loss of the country inn (an investment of more than $400,000).

35. The Complaint was served within weeks after Mr. Calvo entered an appearance participating in the appeal of a Warehouse related Commission decision against the Warehouse underwriter.

(he did not even see it until September of 1992, more than one year after the complaint was filed, and more than three years after he was supposed to have approved it).[36] The initial complaint contained numerous counts that had to be dropped during the summer of 1992, when counsel for the Florida Bar discovered that they had never been authorized and would have involved *ex post facto* enforcement of rules subsequently adopted.

The complaint, as eventually amended, alleged violations of two rules of the former Florida Bar Code of Professional Responsibility, DR 1-102(a)(1) and DR 1-102(a)(6).[37] The first prohibited violation of any disciplinary rule, and the second read as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The Florida Bar filed a motion to limit issues at trial to that of discipline, claiming

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36. The Florida Bar rule governing the subject proceeding, Rule 3-7.4(k), required that the complaint be promptly prepared, signed by the chairman of the grievance committee and promptly served, with proceedings to be concluded, if reasonably possible, within six months thereafter.

37. Hereinafter referred to as "DR 1-102(a)(1)" and "DR 1-102(a)(6)," respectively.

that a violation of Commission Rule 2e was an automatic violation of undefined Florida disciplinary rules. The referee granted the motion but Mr. Calvo appealed to the Florida Supreme Court which rejected the decision and ordered a *de novo* hearing.[38]

During the proceeding, Mr. Calvo's ability to obtain meaningful discovery was circumvented by the referee's lack of jurisdiction over the Commission, which provided assistance solely to the Florida Bar, and by the Florida Bar's refusal to cooperate in discovery. Mr. Calvo filed motions to compel discovery but the referee, instead, granted the Florida Bar's motions for protective orders, as a result of which Mr. Calvo was limited to five interrogatories. Mr. Calvo eventually obtained a number of documents from the Florida Bar pursuant to requests for production; however, the Florida Bar had lost the files originally provided by Mr. Calvo during the investigative stage of the proceeding and had also misplaced its own files for the initial two years of the action. During the ensuing seven years most potential witnesses had disap-

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38. After a resulting delay of one year.

peared or were outside of the referee's jurisdiction.

Immediately prior to the final hearing, Mr. Calvo filed notices required under Florida law for taking of mandatory judicial notice.[39] However, the Florida Bar opposed them and the referee refused to take judicial notice of the requested matters (*e.g.*, the Gallagher Appeal and the record thereof) or to admit any of the evidence involved.

When the hearing convened, Mr. Calvo introduced his attorney, G. Richard Chamberlin,[40] and his law partner, Larry D. Houston, who was to assist Mr. Chamberlin.[41] Florida Bar counsel demanded that they be precluded from participating at the final hearing because Mr. Calvo had previously proceeded on a *pro se* basis. He also objected to Mr. Chamberlin because Mr. Calvo had indicated that he intended to call Mr. Chamberlin as a witness.[42]

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39. Principally involving the Gallagher Appeal where the Commission took the position that Mr. Calvo had provided neither oral nor written opinions authorizing the Warehouse closing, see Section 90.203 of the Florida Evidence Code.

40. Who had successfully represented Mr. Calvo in the Commission 2e proceeding and had represented the Gallaghers in their Warehouse related proceedings.

41. With reference to technical evidentiary matters.

The referee determined that Mr. Chamberlin could either be a witness or Mr. Calvo's attorney whereupon Mr. Calvo stated that he would require Mr. Chamberlin as an attorney to cross examine Bremer (expected to be the Florida Bar's principal witness). Counsel for the Florida Bar then asserted that he intended to call Mr. Chamberlin as a rebuttal witness and demanded that Mr. Chamberlin be barred from the proceeding.[43] The referee agreed and Mr. Calvo was left without his attorney.[44] Notwithstanding the claims of counsel for the Florida Bar it did not call Mr. Chamberlin as a witness or even speak to him about such

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42. In light of the referee's refusal to take judicial notice of the proceedings in the Gallagher Appeal, Mr. Calvo intended for Mr. Chamberlin to testify that, during oral argument before the United States Court of Appeals for the 11th Circuit, counsel for the Commission had, in response to a question from the bench, asserted that Mr. Calvo had provided neither an oral or written opinion authorizing closing on the Warehouse offering. Testimony that the Florida Bar could not have contradicted. Such testimony should have been permitted under Rule 4-3.7, subsections (1), (2) and (3) of the R.Reg.F.B.

43. But see Section 90.616(c) of the Florida Evidence Code, pursuant to which Mr. Chamberlin should not have been excluded.

44. The referee refused to bar Mr. Houston from the proceeding; however, Mr. Houston was utterly unfamiliar with the case, the applicable law, or the potential witnesses. Mr. Houston was then required to immediately proceed with the hearing.

role. In order to preserve his rights on appeal, Mr. Calvo also refrained from calling Mr. Chamberlin as a witness.

At the final hearing the Florida Bar presented five witnesses, Edward Bremer, Marvin Richmond,[45] James Beasely,[46] Joseph Caruncho[47] and the presiding officer of the grievance committee. The testimony of Messrs. Richmond and Caruncho corroborated Mr. Calvo's version of the events and contradicted that of the Florida Bar's prime witness, Bremer. Bremer's testimony was also contradicted by transcripts of sworn testimony provided to the Commission by Gary Granai,[48] and by transcripts of conversations Bremer had taped and which the United States Justice Department had transcribed.[49] The decision of the

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45. The person who was repaid for a loan to Bremer from offering proceeds.

46. An "expert" witness on the issue of underwriter's counsel.

47. A former associate in the Calvo Firm.

48. Warehouse's attorney.

49. Mr. Calvo was not permitted to introduce the copy of such transcripts that he had obtained from the Warehouse underwriter, rather, he was permitted to ask impeaching questions based thereon. Mr. Calvo had intended to enter selected portions of such transcripts, however, the Commission, which had custody of the originals, refused to provide or authenticate them, even when the referee ordered the Florida Bar to use best efforts to obtain them for the hearing.

referee was, however, principally based on two final judgments introduced by the Florida Bar as "evidence" at the final hearing, over Mr. Calvo's objections: the final judgment in the Injunction Case and the final judgment in the 2e Case.[50] Mr. Calvo's objections were based on the fact that both judgments were based on a mere preponderance of the evidence while Florida Bar proceedings required proof by the higher "clear and convincing" standard.

During the hearing, over the objections of Mr. Calvo, the Florida Bar was allowed to introduce multi-stage hearsay evidence by Bremer[51] and to prove that Mr. Calvo had acted as counsel to the underwriter[52] throughout the

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50. Both those judgments were based on aider and abettor liability under Section 10(b) of the Securities Exchange Act of 1934, as amended, a doctrine rejected by this Court in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

51. Concerning what Granai had allegedly told him that Mr. Calvo had said third parties had said they would do, despite the fact that the purported declarants were readily available as witnesses, living in the district in which the hearing was held. The due process clause unquestionably guarantees to a defendant the right to cross examine the governments witnesses, and that right is violated when such witnesses are not presented, but rather, the evidence is presented through multi-stage hearsay. See, *e.g.*, United States v Grande 620 F.2d 1026, at 1035 (4th Cir., 1980).

52. The referee and the Florida Supreme Court both decided that Mr. Calvo had represented both the underwriter and Warehouse in the offering, based on the allegations of the Florida Bar and the testimony of

Warehouse offering[53] by expert testimony[54] to the effect that Commission rules (which could not be cited)[55] made legal counsel to an underwriter an expert for purposes of registration statement liability, that such counsel was consequently required to file a written consent to the use of its name in a registration statement, and therefore could only be replaced through a formal amendment to the registration statement.[56] Since no amendment had been filed removing Mr. Calvo's name as counsel to the underwriter,

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its expert witness, despite Bremer's testimonial admission that Mr. Calvo had never represented Warehouse.

53. No evidence to that effect was testified to by the underwriter, whom Florida Bar counsel declined to call as a witness, or by Mr. Calvo, the only two parties in a position to resolve the issue.

54. His expertise was based on having participated in up to five underwritings as counsel to the underwriter, none of which involved a small offering subject to the rules that applied to the Warehouse registration statement.

55. In fact, he was unable to to cite to any statute, rule or case, other than to the item 24 of the exhibit schedule in Item 601 of Commission Regulation S-K, which, in fact, is the subject of Commission Rule 436.

56. The expert's testimony was diametrically opposed to the actual rule (Commission Rule 436, which specifies as follows in subsection (e) thereof: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity."

he testified that Mr. Calvo remained responsible for the conduct of the entire offering.[57]

The presentation of Mr. Calvo's case was crippled by the Florida Bar's loss of his files, its alleged loss of its own files, the referee's protective order limiting Mr. Calvo's ability to conduct discovery, and, the lengthy, unexplained and un-excused delay by the Florida Bar in bringing the proceeding;[58] it was crippled by the expulsion of his attorney (Mr. Houston[59] did not present any witnesses other than Mr. Calvo, since he was totally unfamiliar with their potential testimony,[60] and did not introduce any materials

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57. Notwithstanding the fact that he received no fee for such function and that another law firm did. See, *contra*, Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

58. Throughout the proceeding, all of the Florida Bar's substantive witnesses claimed an inability to recall events, when cross examined.

59. Who was required to immediately assume the defense, without any time for preparation or consultations with Mr. Calvo.

60. Affidavits contradicting all of Bremer's hearsay allegations were provided from the purported declarants, following the final hearing as supplements to the record, but were rejected by the Florida Supreme Court. In all but one case, the declarants resided in the district in which the Florida Bar's prosecuting office was located and all were readily available for questioning or presentation by the Florida Bar. The single out of state affiant had offered to make herself available to the Florida Bar, as it required.

refuting the expert witness because he was totally unfamiliar with the applicable law);[61] and it was crippled by the vagueness of the rules he was charged with violating, which made preparation for defense virtually impossible since the rule covered virtually anything the Florida Bar might subjectively deem inappropriate.

Mr. Calvo's presentation was crippled by the refusal of the referee, based on the Florida Bar's objections, to permit Mr. Calvo to introduce evidence of the detailed studies and reports concerning the responsibilities of securities lawyers published by the American Bar Association and the Association of the Bar of the City of New York.[62]

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61. The most important and irrefutable contradictory evidence being the text of Commission Rule 436(e), and the following materials describing the role of securities lawyers by the Florida Bar, itself: The lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

62. American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980). Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977). Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37* The Business Lawyer 915 (1982). *Statement of the Section of Cor-*

Mr. Calvo's ability to defend himself was very detrimentally impacted by improper allusions by Florida Bar counsel to Mr. Calvo's birth in the Republic of Colombia followed by citations to disciplinary actions against attorneys involved in narcotics trafficking, implying, that although not charged, as a Colombian, Mr. Calvo was obviously involved in illegal activities.[63]

During December of 1992, the referee found Mr. Calvo guilty of all allegations made by the Florida Bar, even where no supporting evidence had been introduced[64] and agreed with the Florida Bar that because of aggravating factors[65] Mr. Calvo should be disbarred.[66] In addition,

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poration, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980).

63. Such vague implications could indeed have been covered by DR 1-102(a)(6), which could be interpreted to make it improper to have been born in Colombia, or to represent, usually on a *pro bono* basis, Colombian immigrants.

64. *E.g.*, motivation, characteristics of alleged victims, likelihood of future violations, bad character, *etc.*

65. Again as to which no evidence was introduced, other than the allegations made by Florida Bar counsel during closing arguments.

66. Such request was not included in any pleadings and was first raised, to Mr. Calvo's dismay, during closing arguments by the Florida Bar.

despite the fact that the Florida Bar had been forced to dismiss most of its counts against Mr. Calvo and had been reversed by the Florida Supreme Court on the product of its initial year of litigation (the motion to limit issues at trial), the referee awarded all costs[67] to the Florida Bar.

Mr. Calvo filed a petition urging the Florida Supreme Court to reject the referee's findings of fact, conclusions of law and recommendations and in support thereof filed a brief, reply brief[68] and a number of motions for permission to supplement the record. The Florida Bar filed motions to strike the Appeal Briefs, a responsive brief, and objections to any attempts to supplement the record pointing out that any problems therewith were the result of tactical or strategic error's in the presentation of Mr. Calvo's case.[69] At oral argument before the Florida Supreme Court counsel for the Florida Bar claimed that notwithstanding the clarity of the record on such point, Mr.

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67. More than $7,000.

68. The brief and reply brief are hereinafter referred to as the "Brief" and the "Reply Brief" and collectively as the "Appeal Briefs."

69. While at the same time, denying that Mr. Calvo had been prejudiced by the expulsion of Mr. Chamberlin.

Calvo had elected to use Mr. Chamberlin as a witness rather than as his attorney and that Mr. Chamberlin's expulsion was not based on Florida Bar counsel's intent to call Mr. Chamberlin as a witness.[70]

On December 16, 1993, the Florida Supreme Court adopted the recommendations, findings and conclusions of the referee and in a strongly worded decision concluded that Mr. Calvo had represented all of the parties to the Warehouse offering and in such role, was responsible for the sale of the securities offered and for all of the information in the Warehouse registration statement. The decision adopted the conclusions of the Florida Bar's expert witness and ignored all of Mr. Calvo's due process and equal protection arguments. Mr. Calvo then filed the Rehearing Motion in which he expanded on his constitutional arguments. The motion for rehearing was denied without comment on February 10, 1994.

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70. Mr. Chamberlin, upon learning of such allegation, immediately wrote to the chief justice of the Florida Supreme Court, providing supporting affidavits from Mr. Calvo and Mr. Houston, denying the claims of Florida Bar counsel. Florida Bar counsel responded by characterizing such letter as an improper attempt to influence the Court.

V. REASONS FOR GRANTING WRIT

1. The underlying subject matter has been the subject of actions before the Commission, and, the United States Courts of Appeal for the Second and Eleventh Circuits. The two Commission decisions reached inconsistent results, as did the decisions in the Second and Eleventh Circuits.[71]

Related disciplinary matters based on the Florida Supreme Court decision are pending in the United States Courts of Appeal for the Fifth and Eleventh Circuits and the United States District Court for the Southern District of Florida thus this case will impact the role of attorneys not only within the State of Florida, but also in more than one third of the United States Courts of Appeal. The United States Court of Appeal for the Fifth Circuit has affirmatively deferred a decision in the matter until such issue is considered by this Court and the other federal courts before which the issue is pending appear to be

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71. Based on differing interpretations of the responsibilities imposed on Mr. Calvo in the Warehouse offering by applicable federal securities laws, all of which run counter to this Court's recent decision in Central Bank of Denver, N.A. v First Interstate Bank, *supra*.

doing the same.

A review of the Florida Supreme Court's decision by this Court is needed to clarify the applicable law and render it uniform throughout the federal system.

2. The Calvo Case raises critical constitutional issues involving the applicability of due process, equal protection and protection from *ex post facto* regulation of professional conduct. These include fundamental concepts such as the right to legal counsel, whether state regulators may wait indefinitely after authorizing a disciplinary proceeding before starting it and whether their failure to comply with statutorily established procedures for prosecution involves deprivation of due process and equal protection.[72] They also involve the issue of whether or not state regulatory authorities are required to equally apply judicially developed standards when making decisions in disciplinary matters.[73]

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72. The case will also permit the Court to address the question of whether or not the equal protection clause of the Fourteenth Amendment to the United States Constitution requires the states to honor the guarantees of their state constitutions in proceedings regulating state licensed professions.

The issues are especially important where it has become obvious that hispanics are subjected to illegal discrimination preventing them from advancing into leadership roles based on discriminatory enforcement of professional rules.

3. The rule of conduct on which the Florida Supreme Court based its decision was repealed without re-enactment and without a savings clause on December 31, 1987. Nonetheless, it was used in this proceeding, formally initiated during August of 1991. The rule, or variations thereof, was embodied in the codes regulating conduct of attorneys in most states and still survives in a number. Similar rules are used to regulate the conduct of other persons whose professions are reliant on government licenses. A decision on whether or not such rule is unconstitutionally vague will have national implications both within and outside the legal profession.[74]

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73. *E.g.*, on issues such as allocation of costs and application of equitable doctrines such as latches, waiver and estoppel.

74. In addition, the Court will be able to rule on the important technical issue of whether or not rules regulating conduct that have been repealed without re-enactment or a savings clause can continue to be

4. The Court will have the opportunity of addressing the issue of whether or not the introduction of final judgments as evidence of their findings of fact is constitutionally permissible in proceedings requiring higher standards of proof. While the issue has been decided in the area of criminal law, this Court should address it in a non-criminal law setting.[75]

5. The Court will be provided the opportunity to rule on two important federal questions, the status of attorneys representing underwriters as "experts" for purposes of defining their obligations and liabilities under federal securities law and their responsibility for inaccuracy of materials contained in registration statements, as well as their responsibility when facts change after counsel's participation; and, the Florida Supreme Court's opinion that

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enforced.

75. It will also have the opportunity of addressing the due process propriety of multiple hearsay as a predicate for decisions requiring proof by clear and convincing evidence.

attorneys in securities transactions are obligated to participate in the selling process. That is especially important since, in the past, this Court has carefully differentiated an attorney's liability based on whether he participated in selling activities.[76]

VI. ARGUMENT

DUE PROCESS

Disciplinary Rule 1-102(A)(6)

Statutes or rules that govern conduct must "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application."[77]

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76. The Court will also have the opportunity of applying its interpretation of Section 10(b) of the Securities Exchange Act of 1934, as amended, in Central Bank of Denver, N.A. v First Interstate Bank, *supra*, to areas beyond private litigation.

77. See Baggett v Bullitt, 377 U.S. 360 (1964); Keyishian v Board of Regents, 385 U.S. 589 (1967); Watkins v United States, 354 U.S. 178 (1957); Lovell v City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938), Thornhill V Alabama, 310 U.S. 88 (1940); Talley v California, 362 U.S. 60 (1960); Edwards v South Carolina, 372 U.S. 229 (1963); Cox v Louisiana, 379 U.S. 536 (1965); and, Brown v Louisiana, 383 U.S. 131 (1966).

This Court specifically addressed the issue in the context of regulation of the practice of law when it found much more specific regulations than those here involved too vague to meet constitutional requirements, lending themselves "to selective enforcement against unpopular causes," see NAACP v Button, 371 U.S. 415 (1963). The Florida Supreme Court has acknowledged such concept[78] but in this case, clearly ignored it.[79]

DR1-102(A)(6), provides that: "A lawyer shall not [e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other sections of DR1-102(A) but provides no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Florida Bar to disbar any attorneys it finds objectionable on any grounds

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78. See Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (Fla. 3rd DCA 1988).

79. Mr. Calvo first raised objections to the validity of DR 1-102(A)(6) in a motion to dismiss prior to the Final Hearing. He subsequently challenged such rule at the Final Hearing, in his Appeal Briefs and expanded on his objections to the validity of such rule in his Rehearing Motion.

imaginable. It is therefore constitutionally deficient and prosecution thereunder should not be permitted.[80]

DR 1-102(A)(6) was repealed without re-enactment by the Florida Supreme Court effective as of January 1, 1988, reflecting an acknowledgment that it was not an appropriate predicate for discipline.[81] Nonetheless, the Calvo Case stands for the proposition that repealed provisions not included in the re-enacted code continue as viable predicates for conduct prior to their repeal.[82] Provi-

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80. See, *accord*, Webb v Department of Professional Regulation, Board of Professional Engineers, 595 So.2d 1103 (Fla. 5th DCA 1992); and, Delk v Department of Professional Regulation, 595 So.2d 966 (Fla. 6th DCA 1992). See also D'Alemberte v Anderson, 349 So.2d 164 (Fla. 1977); and, State v Wershow, 343 So.2d 605 (Fla. 1977).

81. DR1-102(A)(6) was not included in the revised rules promulgated in 1987. However, the Florida Supreme Court refused to follow its prior rulings to the effect that repeal without a savings clause or substantial re-enactment of a rule regulating conduct renders it inapplicable, even in then pending cases. See Fort v Fort, 104 So.2d 69 (Fla. 1st DCA 1958); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964); and, State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959). Such refusal deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

82. Such decision constitutes a retroactive promulgation in violation of constitutional prohibitions against *ex post facto* laws, since the position of the Florida Bar prior to this case was clearly different. See Yaffee v International Co., 80 So.2d 910 (Fla., 1955) and see Flord v State, 129 So. 861 (Fla. 1930); Fort v Fort, *supra*.

sions virtually identical to those in DR 1-102(A)(6) exist in the rules regulating the practice of law and other professions in states other than Florida. Thus, despite its repeal in Florida, the rule and its relatives continue to be major factors in regulation of governmentally licensed professions. This Court should address the constitutional propriety of such regulation, in light of the manner in which it has been applied to Mr. Calvo in the Calvo Case, as well as the constitutional propriety of continuing to enforce rules governing conduct that have been repealed, without re-enactment and without a savings clause.

Assistance of Counsel

The exclusion of Mr. Calvo's attorney from the trial based on a motion by the Florida Bar claiming that it intended to call him as a rebuttal witness[83] violated Mr. Calvo's rights to due process guaranteed by the United States[84] and Florida[85] Constitutions.[86] Such exclusion was

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83. This issue was raised at the commencement of the Final Hearing, as well as in the Appeal Briefs and Rehearing Motion to the Florida Supreme Court.

84. See amendments Five, Six and Fourteen to the United States Constitution.

critically prejudicial to Mr. Calvo.[87]

During the Final Hearing the referee, based on the motion of Bar Counsel and over the strenuous objection of Mr. Calvo, excluded Mr. Calvo's trial attorney, G. Richard Chamberlin,[88] from participation or attendance at the

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85. Due process is guaranteed by Article One, Section Nine of the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Two and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (5th Cir. 1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (Fla. 1960). The guarantees provided in Section One, Article Sixteen, are available to respondents in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, 196 So. 487 (Fla. 1940).

86. The right to be represented by counsel in both civil and criminal proceedings is equated with due process, see Times Pub. Co. v Burke, 375 So.2d 297 (Fla. 1979). The guarantees provided in Section One, Article Sixteen, are available to Respondent's in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, *supra.*

87. Such prejudice was impliedly admitted in the Florida Bar's brief to the Florida Supreme Court, where it criticized Mr. Calvo's conduct of the hearing in not calling rebuttal witnesses or introducing exculpatory evidence.

88. The Court is asked to judicially note that Mr. Chamberlin acted as counsel in the oral argument of the Gallagher Appeal, represented the Gallagher's before the Commission, represented Mr. Calvo in the 2e Case, and consequently, was an expert in the Warehouse series of cases.

hearing.[89] Larry D. Houston, Esquire, another attorney who Mr. Chamberlin intended to use to assist with technical evidentiary issues, was forced to conduct the defense, without any continuance, despite the fact that he knew practically nothing about the case or applicable law, and had never had an opportunity to speak to the numerous witnesses arranged for the trial.[90] Consequently many

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89. Mr. Calvo pointed out that both Rule 4-3.7, subsections (1), (2) and (4) of the R.Reg.F.B. and Section 90.616(c) of the Florida Evidence Code permitted Mr. Chamberlin's continued participation, but was overruled.

90. The Florida Supreme Court was falsely led to believe by counsel to the Florida Bar during oral argument that Mr. Calvo was offered a choice by the referee in the Calvo Case to either use G. Richard Chamberlin, Esquire, as a witness or as his attorney, and that Mr. Calvo elected to use Mr. Chamberlin as a witness, although he was never called for such purpose. In fact, as demonstrated in a letter provided by Mr. Chamberlin to the Chief Justice immediately following the oral argument, Mr. Calvo, when faced with such election chose to use Mr. Chamberlin as his attorney; however, counsel to the Florida Bar indicated that he intended to call Mr. Chamberlin as a rebuttal witness, whereupon the referee disqualified Mr. Chamberlin and ordered him out of the room. A copy of Mr. Chamberlin's letter, together with the affidavits of Mr. Calvo and of Larry D. Houston, Esquire, which accompanied such letter were annexed as exhibit 1-A to Mr. calvo's Rehearing Motion.

The case of Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials. The court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process. The holding agrees with the holdings in Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405

rebuttal witnesses to Mr. Bremer's testimony (*e.g.*, Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer) were never called to testify.[91] In addition, being unprepared and unfamiliar with the applicable law, Mr. Houston failed to rebut the testimony of the Florida Bar's expert through use of the text of Commission Rule 436(e) or the Florida Bar's own materials from the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*.[92]

(Fla. 1981), although the Florida Supreme Court failed to abide therewith!

This Court is asked to note that Mr. Calvo's comments on page 8 of the record, lines 2 to 24 (copies of which were included in Mr. Chamberlin's letter to the Chief Justice), make it irrefutable that it was Florida Bar counsel's stated intention of calling Mr. Chamberlin, as a witness, not the non-existent election by Mr. Calvo to do so, that led to his disqualification.

91. Their examination, and an examination of the financial reports for Messrs. Jenkins, Baldrica and Scherer would have clearly demonstrated that Bremer's testimony that Mr. Calvo assisted or attempted to assist in locating loans to effect a fraudulent closing was totally false.

92. Mr. Chamberlin would have rebutted such testimony by merely pointing out that the identity of underwriter's counsel should have been proven by the Florida Bar through establishing the identity of the attorney who filed the request for acceleration with the Commission and who negotiated the terms of the underwriter's compensation with the NASD, in each case being the the Beer Firm. The Florida Bar could have obtained the copies of such correspondence easily (while Mr. Calvo could

Mr. Chamberlin was not a witness to any facts material to the proceeding nor did he have any knowledge thereof, except as obtained when acting as attorney for Mr. Calvo during the appeal of the injunction and the 2e proceeding, or to the Gallaghers, thus, he could not have provided any testimony at the Final Hearing unless Mr. Calvo and the Gallaghers waived their rights to attorney client privilege. Because they did not, there was no basis for the use of Mr. Chamberlin as a witness by the Florida Bar, and, in fact, the Florida Bar never called Mr. Chamberlin as a witness or even interviewed him with that possibility in mind.[93]

Mr. Calvo specified at the Final Hearing that Mr. Chamberlin was essential to the cross examination of Bremer.[94] Mr. Chamberlin intended to impeach Mr.

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not).

93. The referee made no inquiry as to what evidence Mr. Chamberlin was to provide on behalf of the Florida Bar.

94. See pages 7 and 8 of the record of the Final Hearing, copies of which were included in the appendix filed with the Reply Brief, and were also included as part of exhibit 1-A to his Rehearing Motion.

Bremer by introducing affidavits provided by Mr. Bremer to the Commission in the Injunction Action.[95] Indeed, in paragraph 52 of the First Bremer Affidavit, Bremer flatly admits[96] that Mr. Calvo believed that the purchase of stock by Bremer (as explained to Mr. Calvo) was unequivocably legal.

Mr. Calvo's rights to due process included the right to meaningful[97] representation by counsel. That right was

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95. With which Mr. Chamberlin, but not Mr. Houston, was totally familiar. Bremer provided the Commission with three separate affidavits for use in the Warehouse litigation; however, the Commission withheld the first affidavit provided by Bremer because it authenticated the Bremer tapes which the Commission wanted to exclude from consideration in conjunction with its motion for summary judgment. Bar Counsel in this proceeding also succeeded in excluding introduction of such transcripts when the Commission failed to provide them for the Final Hearing at the instruction of the Referee to Bar Counsel. The affidavits were included in the joint appendix filed by Mr. Calvo with the United States Court of Appeals for the Second Circuit in *Commission v Calvo*, 891 F.2d 457 (2d Cir. 1989), at pages A486 through A491 (the "Third Bremer Affidavit"), A685 through A713 (the "First Bremer Affidavit") and A714 through A727 (the "Second Bremer Affidavit"). Excerpts from such affidavits were included as exhibits to the Rehearing Motion. A review of such excerpts demonstrates material differences between them and between them and the testimony of Bremer at the Final Hearing to a degree that would have rendered Bremer totally incredible as a witness, and would have corroborated the bulk of Mr. Calvo's testimony.

96. Confirming the assertions in the Granai deposition that Mr. Calvo was certain that the Bremer stock purchase was legal, and, confirming Bremer's testimony at the Final Hearing that, at the closing, Mr. Calvo did not believe that anything improper was being undertaken.

violated in the Calvo Case.[98] This Court should address itself to the legal consequences of such violation.

Timely Notice; Timely Hearing

In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), this Court outlawed the replevin statutes of numerous states, including the State of Florida, because of their constitutionally inadequate notice and hearing provisions. This Court has held that the fundamental requirement of due process is opportunity to be heard at a meaningful time and in a meaningful manner,

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97. The right under the Florida Constitution to assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings, see Myles v State, 602 So.2d 1278 (Fla. 1992). The case of Traylor v State, 596 So.2d 957 (Fla. 1992) makes it clear that the evidence presented at the Final Hearing in violation of Mr. Calvo's right to representation by counsel is not competent evidence, and cannot be used to justify the Florida Supreme Court's decision in this action.

98. Mr. Calvo was also not represented by counsel at the grievance committee hearing because the Complainant refused to grant a short continuance permitting attendance by his attorney. The only continuance in this matter granted to Mr. Calvo was during the pendency of his successful appeal of the Referee's decision limiting issues at trial. All of Mr. Calvo's other requests for postponements, even in the interests of clients facing federal criminal proceedings were rejected, while postponements to meet the Complainant's vacation schedule were liberally granted.

see Matthews V Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976). The procedural rules for disciplinary proceedings as interpreted by the Florida Supreme Court, pay lip service to such requirements; however, such constitutional requirements are, in fact, absent therefrom.[99]

Mr. Calvo was never provided with notice of the filing of the complaint, the only notice being a 1988 notification that the matter was being referred to a grievance committee. Mr. Calvo was never provided with notice of the decision of the grievance committee and did not even hear of it until receipt of a complaint in this action during August of 1991.[100] The Florida Supreme Court refused to consider the multi-year lapse by the Florida Bar in filing the complaint after its purported authorization by the

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99. These issues were first raised in Mr. Calvo's answer to the Florida Bar's complaint, and revisited at the Final Hearing and in the Appeal Briefs and Rehearing Motion.

100. This despite the internal requirement elucidated by the Florida Supreme Court in Florida Bar v Randolph, 238 So.2d 635 (Fla. 1970), that disciplinary matters be resolved within six months after initiation of an investigation, and, the specific procedures established in current Rule 3-7.4(k) of the R.Reg.F.B., *to wit*: "If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding ...."

grievance committee[101] and ignored the legal consequences of the intervening notification to Mr. Calvo by the Florida Bar that he was, in fact, in good standing as a member thereof. Had Mr. Calvo been told that the grievance committee had recommended that he be disbarred[102] he would not have moved back to Florida and resumed his practice of law in Florida; rather, he would either have assumed an active role in the management of his family investments in North Carolina, or, returned to practice law in the State of New York.[103]

The correct consequences of unjustified delays in Bar proceedings were addressed by the Florida Supreme Court definitively in the cases of Florida Bar v Randolph, *supra.*; and, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978).[104] Based on the holdings in such cases, the Calvo

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101. No written grievance committee decision was ever provided to Mr. Calvo, and it is believed none was ever prepared.

102. He first learned of that recommendation during the Florida Bar's closing argument at the Final Hearing .

103. He certainly would not have abandoned the few remaining Warehouse records he had when he left North Carolina.

104. The Florida Supreme Court "*pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers*

Case should have been dismissed because of the unexcused prosecutorial delay in initiating the action, and because of applicability of the equitable doctrines of latches, waiver and estoppel.[105]

In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), the United States Supreme Court held that the constitutional right to due process requires proper notice and a timely hearing. In the Calvo Case, the Florida Bar's delays were neither explained nor justified.[106] Like the replevin statutes, Bar disciplinary rules must conform to constitutionally mandated standards.[107] Such stan-

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from unjust delays, might well supplant more formal judgment as a form of discipline. That is so even though the record shows that the conduct of the lawyer merits discipline. The refusal of the Florida Supreme Court to follow the standards it set deprived Mr. Calvo of his right to equal protection guaranteed by the Florida and United States Constitutions.

105. A detailed analysis of such cases is contained in the Reply Brief and Rehearing Motion.

106. The Florida Bar's response to such delays and its violations of Rule 3-7.4(k) of the R.Reg.F.B. which governed the procedure applicable in the Calvo Case, was that such rules of procedure were not "jurisdictional" and failure to comply therewith was of no consequence.

107. In the Calvo Case, the Florida Supreme Court should have, based on the criteria it established in the McCain Case, found the Florida Bar's action was barred as a result of its unreasonable delays. Failure to comply with its own criteria and to enforce the procedural obligations of Bar Counsel under Rule 3-7.4(k) of the R.Reg.F.B. deprived Mr. Calvo

dards were not met in the Calvo Case because the Florida Supreme Court took the position espoused by the Florida Bar that in attorney disciplinary cases, they are merely "voluntary" and non-jurisdictional. This Court should intercede to make it clear that due process is not a voluntary concept, and that no tribunal has jurisdiction to ignore it.

Discovery & Evidentiary Matters

The Florida Supreme Court is bound by the guarantees of due process and equal protection imposed by the Florida and United States Constitutions.[108] In that regard, Mr. Calvo was entitled, during the conduct of the Florida Bar proceeding, to a meaningful ability to defend himself.

Notwithstanding such rights, Mr. Calvo was deprived of his right to conduct meaningful discovery as a result of:

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of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

108. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (Fla. 3rd DCA 1984).

protective orders granted in favor of the Florida Bar; the refusal of the Commission to provide copies of required materials; and, the alleged loss by the Florida Bar of years worth of its files, including the materials provided by Mr. Calvo to the Florida Bar in conjunction with its investigation. He was deprived of his statutory right to have matters judicially noted under mandatory judicial notice provisions of Florida law,[109] and to introduce relevant, competent evidence (as a result of the refusal of the referee to take such notice or admit such evidence).[110] Among the excluded materials were the judicial record of proceedings in the Gallagher Appeal and reports of the American Bar Association and the Association of the Bar of the City of New York dealing with ethical obligations of attorneys in matters involving securities laws. He was deprived of his right to have inappropriate and prejudicial evidence excluded; *e.g.*, the Bremer hearsay testimony;[111] the er-

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109. See Section 90.203 of the Florida Evidence Code.

110. In Davis v United States, 415 F.Supp 1086 (D. Kan. 1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings, requiring the rejection of the factual findings. The case specifically deals with attorneys, at pages 1091 and 1092.

roneous testimony of the expert witness; and, the final judgments in the Prior Warehouse Actions (which involved lower standards of proof).[112]

In the Calvo Case, the Referee accepted the testimony of Mr. Bremer[113] to the effect that Mr. Granai had told him that Mr. Calvo had told him that Paul C. Jenkins, Robert Baldrica and James Scherer were heavy hitters whom Mr. Calvo would introduce for purposes of making loans to close the offering, and that Francesca Daniels had calculated the proper escrow period in Mr. Calvo's presence, and based thereon, made his findings of fact.

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111. In the McCain Case, the Florida Supreme Court upheld the referee's finding of fact that hearsay statements were not clear and convincing evidence, regardless of the unquestionable integrity of the witnesses.

112. All of the foregoing issues were raised by Mr. Calvo either prior to or at the Final Hearing and in the Appeal Briefs and Rehearing Motion. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law," Tumey v State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

113. Bremer, unlike Mr. Wright, the witness in the McCain Case, is a convicted felon and, as exposed by comparing the affidavits he provided to the Commission and the Bremer tapes, with his testimony, is utterly incredible, as a matter of law.

Clearly applying the McCain Case standards such findings of fact were unsupported by clear and convincing evidence, but rather by un-persuasive hearsay. The Referee also accepted the testimony of the Florida Bar's purported expert, who had no personal knowledge of the facts at issue, almost no experience in small public offerings, and a demonstrably erroneous grasp of the applicable law. Both the referee and the Florida Supreme Court based their findings of law on such "expert" testimony.

The factual findings in the Calvo Case were improperly influenced by the factual conclusions contained in the final judgments in the Prior Warehouse Cases. Copies of the final judgments were introduced at the hearing as evidence over Mr. Calvo's objections, despite the fact that the standard of proof in the Prior Warehouses Cases (a preponderance of the evidence) was less than the standard of proof in the Calvo Case (clear and convincing evidence). The Florida Supreme Court, contrary to its prior decisions on point[114] and decisions throughout the

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114. See Lawton v State, 13 So.2d 211 (Fla. 1943), The Florida Bar v Price, 478 So.2d 812 (Fla. 1985).

federal court system, held that their admission was appropriate and the different standards of proof affected only the weight of the evidence.[115]

In Holman v Washington, 364 F.2d 618 (5th Cir. 1967), the court dealt with use of prior evidence without a proper foundation. It held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as well as under the applicable state constitution. It indicated that a predicate to use of indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. Such holding should have prohibited consideration of Bremer's testimony about statements made by Granai concerning Mr. Calvo's statements concerning Messrs. Jenkins', Baldrica's and Scherer's statements; and, Bremer's statements concerning the statements made by Ms. Daniels, all of which have been denied by the purported declarants in sworn affidavits! It also should have prohibited the tes-

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115. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law," Tumey v State of Ohio, *supra*.

timony of the Florida Bar's purported expert.

The Florida Bar maintains that the practice of law is a privilege that it can regulate as it sees fit. That is not the law as expressed by courts throughout the federal system, and this Court should avail itself of this opportunity to correct the erroneous constitutional interpretation thereof by the Florida Supreme Court. In Harrell v Tobriner, 279 F.Supp 22 (D. D.C., 1967), the court made it clear that the practice of law is a right,[116] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience.

The ability of a person to obtain a fair hearing is more difficult in an administrative setting where the agency acts as prosecutor, judge and appellate body. In such cases the agency must carefully monitor its agents to assure that they respect constitutional guarantees. Mr. Calvo was entitled not to a mere hearing but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include the right to appropriate enforcement of discovery

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116. That is clearly the case under Section One, Article Two of the Florida Constitution, see State ex rel. Sbordy v Rowlett, 190 So.2d 59 (Fla. 1935).

rights,[117] to timely notice of accusations against him, to a timely hearing, to access to mandatory judicial notice as provided by statute,[118] to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially where competent evidence was readily available). Clearly the cases cited should have led the Florida Supreme Court to reject the Referee's findings of

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117. The referee refused to permit Mr. Calvo to propound more that 30 interrogatories to the Florida Bar, despite having been informed that the only discovery available to Mr. Calvo was through interrogatories, requests for admission and requests for production of documents. Instead, the referee issued a protective requiring the Florida Bar had to respond to only five of the interrogatories propounded. A review of such responses, as well as to the response to Mr. Calvo's request for admissions makes it clear that the Florida Bar refused to provide meaningful discovery. Instead it ignored large bodies of irrefutable evidence contradicting its position, and successfully objected to its introduction at the hearing (*e.g.*, the Gallagher Appeal). In addition to the formal restrictions imposed by the referee on the conduct of discovery by Mr. Calvo, he was deprived of access to most of his own records. He provided most of them to the Florida Bar during 1988 and such records were never returned. During 1990, in response to an inquiry from Mr. Calvo, the Florida Bar notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time the Florida Bar proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Commission, nor the Florida Bar were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, Florida Bar counsel admitted that several years worth of its files in the Calvo Case had disappeared.

118. See Section 90.203 of the Florida Evidence Code.

fact as clearly erroneous and unsupported by clear and convincing evidence. It did not do so because in proceedings involving attorney discipline, the Florida Supreme Court is not abiding by its constitutional responsibilities. Where a state court of last resort strays from the constitutional path, only this Court has the ability to force it back. This Court should involve itself in this case in order to take such corrective action.[119]

EQUAL PROTECTION:

The case of Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975), dealt with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. The court specifically found that states may not conserve or allocate a right to practice law;[120] and, that states cannot restrict practice of law in violation of rights to due process

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119. The essence of a procedural due process violation is the deprivation of a protected liberty or property interest without adequate safeguards. The interest may be one that is accorded by either state or federal law. See Johnson v Brelje D.C. 482 F.Supp. 125 (D. N.E Ill. 1979).

120. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

and equal protection under federal and state constitutions.[121]

The decision in the Calvo Case violated Mr. Calvo's right to equal protection in a number of ways, including assessment of costs;[122] failure to abide by decisions of the Florida Supreme Court setting standards for Florida Bar disciplinary proceedings; and, imposition of dispropor-

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121. "A State cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," Tyler v Vickery, *supra.*, at 1103.

122. The Florida Supreme Court assessed all of the Florida Bar's costs against Mr. Calvo, despite the fact that: (i) The Florida Bar's initial strategy of limiting issues at trial had been reversed by the Florida Supreme Court the previous year; (ii) The Florida Bar had been forced to drop a majority of the counts in its complaint against Mr. Calvo when it found that they had not, in fact, ever been authorized, and would have violated Mr. Calvo's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Florida Bar's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) The Florida Supreme Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2e proceeding.

The Florida Supreme Court established the factors for assessment of costs in a case cited by the Florida Bar itself, The Florida Bar v McCain, *supra*. Such factors should have led to a determination that, even if the Florida Bar was successful in its case, each party should have borne its own costs. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions.

tionate discipline on minority attorneys. The violation of equal protection involves the fact that Mr. Calvo's Colombian ancestry was made a finding of fact and was followed by prejudicial citation to decisions involving attorneys engaged in the narcotics trade, by Florida Bar counsel.[123]

The Issue of Costs

The Florida Supreme Court assessed all costs in the Calvo Case against Mr. Calvo,[124] despite the standards it established in The Florida Bar v McCain, *supra*. The action involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench. Addressing the issue of proper assessment of costs, the Florida Supreme Court held that where the Florida Bar takes an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint, each

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123. See, *e.g.*, The Florida Bar v Onett, 504 So.2d 388 (Fla. 1987) and The Florida Bar v Price, *supra*.

124. Costs were assessed based on post hearing *ex parte* communications between the referee and Florida Bar. Mr. Calvo raised issues concerning their impropriety in his Appeal Briefs and Rehearing Motion.

party should bear its own costs even if the Florida Bar is successful in securing a disbarrment.

In the Calvo Case the Florida Bar took an overbroad approach as a result of which it had to voluntarily dismiss a majority of the counts with which it had charged Mr. Calvo. It expounded a legal theory that resulted in one year of litigation, prior to its rejection through appeal to the Florida Supreme Court. Such overbreadth occasioned Mr. Calvo significant loss of scarce funds and time. Based on the McCain Case, the Florida Supreme Court should have reversed the Referee's assessments of costs.[125]

The Florida Supreme Court may not differentiate in the application of its criteria between minority attorneys and former Supreme Court members. To do so violates Mr. Calvo's right to equal protection guaranteed by the Florida and United States Constitutions.[126] It undoubtedly

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125. See, *e.g.*, The Florida Bar v Onett, *supra.*, and The Florida Bar v Price, *supra.*

126. See Truax v Corrigan, 257 U.S. 320, 42 S.Ct. 124, 66 L.Ed 254 (1921), where Chief Justice Taft observed, "Our whole system of law is predicated on the general fundamental principal of equality before the law .... The guarantee was aimed at undue favor and individual or class privilege on the one hand, and a hostile discrimination or the oppression of inequality on the other."

did so in this case and this Court should correct such proclivity.

Right to Non-arbitrary, Cruel or Unusual Punishment

The eighth amendment to the United States Constitution, as applied to the states by the 14th and 5th amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of the Calvo Case, when considered with the intervening punishment to which Mr. Calvo and his family have been subjected and the procedural irregularities associated with the Calvo Case, the disbarrment of Mr. Calvo is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992), cited by the Florida Bar.

The Neu Case held that in order to prove a violation of DR 1-102(A)(6), the Florida Bar had to establish the element of intent to engage in dishonesty, misrepresentation, deceit or fraud by clear and convincing evidence and

that discipline was to be based on a three purpose test.

At the final hearing, no evidence was introduced to indicate that Mr. Calvo intended to deceive anyone;[127] rather, Bremer, the Florida Bar's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing.[128] The referee's findings of fact concerning issues of Mr. Calvo's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by any evidence at all.[129]

With reference to discipline, the three fold test established in the Neu Case required the referee and the Florida Supreme Court to apply the following standards:

First, the discipline had to be fair to society, both in terms of protecting the public from unethical conduct, *and,*

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127. On the other hand, a large quantity of unrefuted evidence of Mr. Calvo's good moral character and integrity was introduced.

128. Testifying for the Florida Bar, Joseph Caruncho admitted that Mr. Calvo always insisted on complete disclosure and never countenanced wrongful conduct.

129. The fact that Mr. Calvo believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits, relevant portions of which were included as exhibits to the Rehearing Motion.

at the same time, not denying the public services of a qualified lawyer. Mr. Calvo is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Commission.[130] The two year suspension was served as a two year suspension from the practice of law. Furthermore, Mr. Calvo was at the time of his disbarrment the only hispanic or securities attorney in his geographic location. A great deal of his practice involving hispanic clientele was either *pro bono* or at greatly reduced rates subsidized by his out of state corporate clientele. While the Florida Bar has noted with concern the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the Calvo Case.

Second, the punishment must be fair, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the un-excused delays in bringing the Calvo Case and the

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130. No evidence was introduced of any other securities violations or of any material misconduct.

myriad procedural deficiencies and irregularities therewith. Obviously, the discipline recommended had no thought for rehabilitation.

Third, the judgment should be severe enough to deter others. The injunction and 2e sanctions[131] provide more than adequate discipline to deter others.

An analysis of this decision and those of the Florida Supreme Court in the Randolph and McCain Cases, *supra.*, as well as an analysis of the punishment in many of the cases cited by the Florida Bar and reviewed in the Rehearing Motion, makes it clear that such disparity is evident in the instant proceedings.[132]

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131. As well as the absence of misconduct of any kind following such sanctions.

132. See, *e.g.*, The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992), one year suspension; The Florida Bar v Moxley, 462 So.2d 814 (Fla. 1985), 60 day suspension; The Florida Bar v Simons, 581 So.2d 154 (Fla. 1991), suspension for one year; The Florida Bar v Adler, 589 So.2d 899 (Fla. 1991); The Florida Bar v Trinkle, 580 So.2d 157 (Fla. 1991), public reprimand; The Florida Bar v Diamond, 548 So.2d 1107 (Fla. 1989), criminal conviction for mail and wire fraud; The Florida Bar v Levine, 571 So.2d 420 (Fla. 1990), criminal conviction for securities fraud, disbarrment related back to date of injunction, making defendant eligible for earlier re-admission; The Florida Bar v Winderman, 614 So.2d 484 (Fla. 1993), suspension reduced; and, The Florida Bar v Stalnaker, 485 So.2d 815 (Fla. 1986), suspension. All of these cases were cited by the Complainant.

Prejudice Based on National Origin[133]

The director of the Florida bar and the Florida Supreme Court have noted that minorities are disproportionately represented in the Florida Bar, especially in positions of leadership and responsibility. Records of results of disciplinary proceedings maintained by the Florida Bar demonstrate that minority attorneys are also disproportionately subjected to disciplinary proceedings and that the standards applied and discipline imposed are more harsh.[134]

The Referee in this matter made a factual finding that Mr. Calvo is Colombian. He did so because the Florida Bar have made an issue of such fact. The issue was compounded by citation to bar disciplinary actions with no relationship to the Calvo Case, but instead involving attorneys disciplined for engaging in narcotics trafficking.[135]

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133. The issue was raised in the Appeal Briefs and Rehearing Motion.

134. The Court is requested to judicially note the reports of attorney discipline published during 1993 in The Florida Bar News, an official publication of the Florida Bar.

135. See, *e.g.*, The Florida Bar v Onett, *supra.*, and The Florida Bar v Price, *supra.*

The implication was clear, *i.e.*, that he had never been accused of involvement with illegal drugs, as a Colombian, Mr. Calvo was a suspect character. It is intolerable that the Florida Bar used such element in its case and the Florida Supreme Court should not have aligned itself with such blatant impropriety! The intercession of this Court is required to correct such inappropriate official conduct.

EX POST FACTO LEGISLATION

The Florida Supreme Court's decision amounts to the promulgation of constitutionally impermissible *ex post facto* standards governing professional conduct.[136]

The Florida Supreme Court decision was based on an interpretation of securities laws totally contrary to that reflected in the Commission's own regulations, as well as in materials promulgated by the Florida Bar. The Florida Supreme Court determined that the expert witness' testimony introduced by the Florida Bar was proper and ac-

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136. Additional argument concerning *ex post facto* legislation by the Florida Supreme Court in this matter is contained in the discussion of the invalidity of DR 1-102(A)(6). The issue of *ex post facto* aspects of the Florida Supreme Court's decision was first raised by Mr. Calvo in his Rehearing Motion.

curate concerning Mr. Calvo's status as legal counsel to the "parties"[137] and as to the role of attorneys as "experts" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Commission under the Securities Act of 1933, as amended.

The Florida Supreme Court rejected the materials from other jurisdictions cited by Mr. Calvo to prove the contrary point, as well as Commission Rules 436(e)[138] and 478.[139] While Florida is free to create its own standards for the conduct of attorneys, whether or not in agreement with the standards of the Commission, the federal courts or

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137. Despite the fact that Bremer has consistently admitted that Mr. Calvo did not represent Warehouse, and that no testimony was introduced by either the underwriter or Mr. Calvo admitting that at the times in question, Mr. Calvo represented the underwriter. Indeed, that factual conclusion flies in the face of the retainer letter entered into by the Beer Firm replacing the Calvo Firm, introduced at the Final Hearing. See excerpts from Bremer affidavits discussed in the Rehearing Motion, and discussions of the replacement as counsel in the Appeal Briefs.

138. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

139. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein.

other states, the Florida Bar had itself indicated to the legal community in the State of Florida[140] that in the preparation of registration statements, attorneys were not to be deemed experts,[141] thus the Florida Supreme Court's retroactive change of interpretation involves the promulgation of constitutionally prohibited *ex post facto* regulation of professional conduct.

In addition to its attorney disciplinary role, the Florida Bar regulates the practice of law in the State of Florida by imposing educational standards and sponsoring seminars to meet such goals. At the very least, the Florida Bar must be held responsible for not misleading practitioners in such seminars so that in applying the laws as espoused, they become guilty of violating the rules governing the practice of law in the State of Florida.[142]

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140. In light of the mandatory education requirements imposed by the Florida Supreme Court and the fact that such information was provided by the Florida Bar at one of the seminars presented in conjunction therewith, it is manifestly unfair and a violation of due process to disbar an attorney for relying on the information so provided.

141. See the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

142. To hold otherwise is akin to authorizing constitutionally impermissible entrapment.

The testimony of the "expert" on which the Florida Supreme Court and the Referee relied is totally at odds with the position which the Florida Bar takes in conjunction with its role as educator of Florida attorneys. That is unequivocally demonstrated by the lecture outline for the Florida Bar's 1987 continuing legal education program.[143] This Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not a lawyer issues written opinions to be shown to third parties, but that even in such cases, an attorney's liability was not deemed to be as described by the Florida Bar's expert. It is further asked to note that in the Gallagher Appeal Case counsel to the Commission unequivocably stated that Mr. Calvo had provided neither oral nor written opinions in conjunction with the Warehouse closing.

If such materials do not reflect the actual state of the law in Florida, then the Florida Bar should have been estopped from bringing this action after having been responsible for so thoroughly confusing the understanding of the

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143. Entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

actual law. The retroactive application of such standards constitute constitutionally impermissible *ex post facto* legislation that this Court should correct.

FEDERAL QUESTIONS

The Florida Supreme Court has ruled that attorneys representing underwriters are, as a consequence of unidentified federal rules, "experts" for purposes of liability under the Securities Act of 1933, as amended. The Florida Supreme Court's decision is clearly contrary to all law on such point.[144] This Court needs to correct such erroneous legal conclusion regarding a uniquely federal question.

In addition, the Florida Supreme Court has ruled that attorneys representing underwriters in federally registered securities offerings are jointly responsible, with the issuer

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144. The Court is asked to note the following rules, regulations, and authoritative sources: SEC Rule 436(e), Item 228.509 of new regulation SB; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035, 1234 through 1242, and 1256; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119; *Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985*, pages 214 through 217; and, *Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 4-343, 4-344, 4-231 through 4-234.11.

and the underwriter, for sale of the offered securities. No authority was cited in support of such proposition.

This Court has been careful to differentiate the liability of securities attorneys, based on their voluntary participation in the securities selling process. In Pinter v Dahl, 108 S. Ct. 2063 (1988),[145] this Court ruled that the term "seller" did not include attorneys acting within the normal scope of rendering professional legal services.

In the very recent case of Central Bank of Denver, N.A. v First Interstate Bank, *supra.*, this Court found that the language of Section 10(b) of the Securities Exchange Act of 1934, as amended, did not cover aiding and abetting liability, the predicate for the Injunction Case on which the 2e decision was also based.

The decision of the Florida Supreme Court is at odds with this Court's interpretations of federal law in that context, and such misapprehension should be corrected.

VII. CONCLUSION

The underlying decision is ripe with timely, multi-

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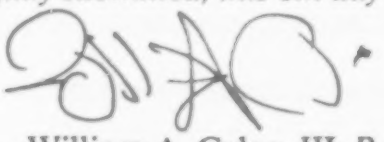
145. Interpreting Section 12 of the Securities Act of 1933, as amended.

circuit, issues of national importance involving due process, equal protection and interpretation of federal securities laws and regulations. Their resolution by this Court is required to clarify existing law and to provide constitutional guidance to agencies charged with regulating professional conduct. Their resolution is also required to correct *de facto* discrimination against hispanics which has and continues to prevent them from assuming their proper role in American society.

Respectfully submitted, this 8th day of May, 1994.



William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126